

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

NO. 77-4091

**UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

COLUMBIA CORRUGATED CONTAINER CORP.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

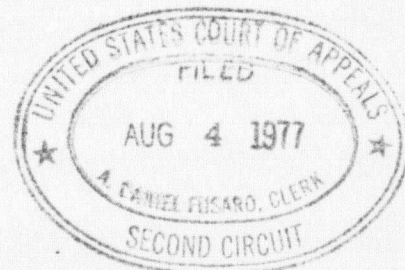
REPLY BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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I N D E X

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1. The Company contends (Br. 29) that "if [Stallworth had] admitted that he had received a direction to return to work on January 6, there would have been no basis for either his charge or the complaint which thereafter issued." In fact, however, the Board sustained the General Counsel's complaint--and Stallworth's charge--^{1/}even though it found that

^{1/} The Company's claim (Br. 10 n. 6) that Stallworth falsified the unfair labor practice charge which he filed with the Board borders on the frivolous. In relevant part, the charge reads (A. 226): "since on or about January 6, 1975, the above-named company has failed to recall from layoff John W. Stallworth . . . because of his refusal to waive his rights under the collective bargaining agreement." When questioned by counsel for the Company, Stallworth made absolutely clear (A. 76-78) that he was "not" claiming "that he should have been recalled on January 6" and that his charge was not premised on such a claim. The obvious premise upon which Stallworth's charge was based was that the Company was denying him employment for discriminatory reasons.

Stallworth had received such an instruction. The Board found that Stallworth's failure to follow Serwitz' December 11 instruction report for work on January 6 was not the real reason Stallworth was discharged. As shown in our main brief (pp. 10-14), the Board's unfair labor practice finding rested primarily on Stallworth's credited testimony that Serwitz told him on March 4 that he "no longer had a job with the Company" because he had given Serwitz a "hard time" by not signing the waiver form. It is therefore apparent that the "crux of this case" is not, as the Company contends (Br. 16), whether Stallworth received an instruction on December 11 to report for one week of work on January 6, but rather whether Serwitz said what Stallworth said he said on March 4. For, if the Board's credibility resolution stands, Serwitz' March 4 remarks constitute "an outright confession of unlawful discrimination." N.L.R.B. v. Ferguson, 257 F.2d 88, 92 (C.A. 5, 1958).

2. The Company repeatedly refers (Br. 15, 26, 27) to Stallworth's testimony concerning the occurrences of March 4 as being "uncorroborated". On the contrary, Stallworth's testimony is supported both by the testimony of Assistant Plant Manager McCloud and by the shifting, contradictory nature of Serwitz' testimony concerning the March 4 events. Thus, while the Company asserts (Br. 15) that Serwitz' testimony is corroborated by McCloud, the record demonstrates, as the Administrative Law Judge found (A. 241), that precisely the opposite is true. Serwitz' testimony was that there was no work for Stallworth to perform on March 4 (A. 149); not only is this testimony belied by the fact that McCloud had instructed Stallworth to report on this date, but McCloud--corroborating Stallworth--

admitted that there was work for Stallworth (A. 166). Further, in his testimony, Serwitz initially confirmed that Stallworth and he had had a conversation on March 4 (A. 148) but, then, shifted his position and flatly denied that any such conversation had taken place (A. 149). Significantly, Serwitz' testimony is devoid of any description of what he said to Stallworth on March 4, and his conflicting claims as to whether any conversation had taken place were never clarified. The fact that Serwitz was contradictory and evasive in his testimony concerning the March 4 recall of Stallworth and their conversation logically indicates, as the Judge found (A. 241), that Serwitz was attempting to avoid disclosing, damaging evidence--namely, the incriminatory statements testified to by Stallworth. In these circumstances, the Judge reasonably determined that Stallworth's testimony concerning the events of March 4 was reliable.

3. The Company repeatedly asserts that the Administrative Law Judge found that Stallworth had "deliberately falsified" his testimony. The Judge made no such finding. Rather, in rejecting the Company's charges of "deliberate falsification," the Judge found only that one material portion of Stallworth's testimony--that dealing with whether he received an instruction on December 11 to return to work on January 6--could not be credited because it was "somewhat contradictory and confusing" (A. 239-240). Accordingly, since the Judge, and the Board, rejected the factual predicate for the Company's argument that Stallworth should be denied reinstatement because he deliberately falsified his testimony, there was no occasion for the Board to respond to the argument in depth. Thus, the Company's position (Br. 30) that "[n]either the Judge

nor the Board made any mention of [Stallworth's alleged 'falsification']
nor addressed themselves to this contention" is unwarranted.^{2/}

4. The Company's contention (Br. 36-45) that Stallworth's refusal to sign the waiver of contractual rights form was not concerted activity is similarly without merit. Initially, and most importantly, the Company is mistaken when it contends (Br. 39-40) that the Union agreed to "modify" or "amend" the "share work" provision of the contract; for the Administrative Law Judge found, and the record shows (A. 243-244; 136-

^{2/} The Company relies (Br. 35) upon N.L.R.B. v. Coca Cola Bottling Co., 333 F.2d 181 (C.A. 7, 1964), a case in which the Seventh Circuit refused to enforce the Board's finding that an employee was discharged for discriminatory reasons. However, the facts in that case bear no meaningful resemblance to those present here. Thus, in Coca Cola, the court emphasized that the Board's 8(a)(3) finding was based exclusively upon the "uncorroborated" testimony of the "discharged employee who time after time . . . swore falsely about material matters." The Court found that the employee "refused to report for work in his new job, and quit," and that even if he had in fact been discharged, his "misconduct exemplified by his pattern of falsification and deceit during his employment with the Company, climaxed by his false testimony at the hearing, surely disqualifies him from reinstatement." (Ibid. at 184-185). In sharp contrast, Stallworth's testimony concerning the critical March 4 conversation was not uncorroborated, and as demonstrated in our opening brief (pp. 12-14), the Board's unfair labor practice finding, although based largely on this testimony, is bolstered by the transparency of the Company's claim that Stallworth, an employee with an excellent work record, was "presumed to have quit" for a single violation of a Company rule that made the penalty of discharge discretionary. N.L.R.B. v. Brake Parts Co., 447 F.2d 503 (C.A. 7, 1971) and Iowa Beef Packers, Inc. v. N.L.R.B., 331 F.2d 176 (C.A. 8, 1964), relied upon by the Company (Br. 34-35), are likewise distinguishable on their facts. In the former the Court pointed out that the discharged employee had been discredited "[i]n every instance" (447 F.2d at 514) by the Administrative Law Judge; in the latter, the Court noted that the trial examiner recommended the discharged employee not be reinstated because he had "deliberately falsified his testimony" (331 F.2d at 185).

137)), that the Union specifically refused to waive this provision of the contract. The Union simply agreed to permit the Company to approach each affected employee on an individual basis. It did not intend to waive the "share work" provision; in fact, the Union specifically informed the Company that each employee would be able to assert his right to share work as provided in the contract.

Furthermore, of the cases relied upon by the Company to support its contention that Stallworth's refusal to sign the waiver was not concerted activity, only one addresses the question presented here.^{3/} In that case--N.L.R.B. v. Northern Metal Co., 440 F.2d 881 (C.A. 3, 1971)--a probationary employee was discharged because he insisted that he had a right, under a collective bargaining agreement, to receive holiday pay. The Third Circuit denied enforcement because it was of the opinion that the employee's conduct was not concerted activity. However, in so holding, the Court noted that it was specifically disagreeing with this Court's Interboro decision [discussed in our opening brief at pp. 14-15]. Since Interboro is, as the Company admits (Br. 37), the applicable precedent in the Second Circuit, the Northern Metal decision provides no support for the Company's position.

^{3/} None of the other cases relied upon by the Company (br. 36-45) "arise in the framework of an attempt to enforce a collective bargaining agreement" (N.L.R.B. v. Buddies Supermarkets, Inc., 481 F.2d 714, 719 (C.A. 5, 1973)), and thus, the holding in these cases are irrelevant to a disposition of the issue presented by the facts here.

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, we respectfully submit that a judgment should be entered enforcing the Board's order in full.

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August 1977.

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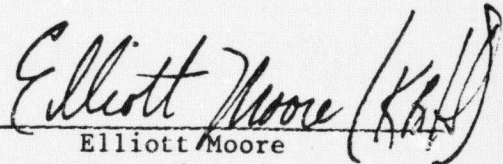
CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Board's
Reply Brief, in the above-captioned case, has this day been served
by first class mail upon counsel for respondent as listed below:

Charles R. Katz, Esquire
360 Lexington Avenue
New York, New York 10017

Dated at Washington, D.C.

this 2nd day of August, 1977


Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD